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No. ——

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

UNITED FARM WORKERS OF AMERICA, AFL-CIO,
Petitioner,
v.
MAGGIO, INC.,
Respondent.

Petition for a Writ of Certiorari to the California Court of Appeal for the Fourth Appellate District

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in a suit against a union based on "some violence and public disorder" during the course of otherwise lawful labor picketing, the First Amendment forbids placing on the defendant-union the burden of proving that the plaintiff-employer's damages were the result of lawful picketing, and *not* the result of the misconduct.

2. Whether the Due Process Clause requires that a judge whose wife worked for an employer as a strike replacement during a labor dispute recuse himself in the employer's suit against a union for damages based on alleged misconduct directed against the replacements during that very dispute.

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PETITION FOR A WRIT OF CERTIORARI

The United Farm Workers of America, AFL-CIO, petions this Court to issue a writ of certiorari to the California Court of Appeal For the Fourth Appellate District, Division One, to review the judgment in *Maggio, Inc. v. United Farm Workers of America, AFL-CIO*, 227 Cal. App. 3d 847 (1991).

OPINIONS BELOW

The unpublished decisions of the California Superior Court for Imperial County are reprinted in the separately bound appendix to this *certiorari* petition (hereafter App., *infra*) at pp. 1a-4a, 5a-10a, and 56a-61a. The decisions of the California Court of Appeal for the Fourth

Appellate District are reported at 227 Cal. App. 3d 847 and 170 Cal. App. 3d 97, and are reprinted at App., *infra*, 11a-54a and 62a-73a. The unpublished order of the California Supreme Court is repirnted at App., *infra*, 55a.

JURISDICTION

The order of the California Supreme Court denying review of the court of appeal's decision was issued on May 16, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble. . . .

The Fourteenth Amendment to the United States Constitution provides:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

1. *Background*

In 1975, the California legislature enacted the Agricultural Labor Relations Act, Cal. Labor Code § 1140 *et seq.* That Act, in protecting the right of agricultural employees to organize and engage in collective bargaining, follows the basic outline of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*[1]

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[1] *See Triple E, Produce Corp. v. Agricultural Labor Relations Board*, 35 Cal.3d 42, 48 (1983); *Highland Ranch v. Agricultural Labor Relations Board*, 29 Cal.3d 848, 855-56 (1981).

In the years immediately following, Cesar Chavez and the United Farm Workers of America, AFL-CIO (the "UFW" or the "Union") undertook the organization of, and the Union was certified as the exclusive bargaining representative for, the employees of some 30 vegetable growers in Southern California's Salinas and Imperial Valleys. The Union entered into an initial set of collective bargaining agreements with the growers, and those agreements expired in December 1978 and January 1979. (RT: XLI, pp. 10,229-30; LXVI, 21).[2]

In late 1978, the UFW undertook negotiations for new contracts with the growers without success. In January 1979 the Union's membership authorized strikes against a number of growers, including Maggio, Inc., one of the largest growers in the Imperial Valley. The strikes were timed to coincide with the winter and spring harvests of broccoli, lettuce and carrot crops, and thereby to put economic pressure on the growers in connection with the Union's efforts at the bargaining table. App., *infra*, 12a.

The UFW maintained pickets against Imperial Valley growers from January through June 1979. In response, a number of growers, including Maggio, formed a "Mutual Harvest Effort," in which they jointly agreed to harvest fields with replacement workers, to coordinate security, to conduct a public relations campaign against the Union and the strikers, and to share the costs and proceeds of that effort. App., *infra*, 12a.

The strike was characterized by strong feelings on both sides. Just as the Union sought to maintain solidarity during the strike, the growers aggressively recruited strike replacements from all segments of the community. Both strikers and grower personnel "were involved in some violence and public disorder." For the

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[2] "RT" citations are to the volumes and relevant page numbers of the reporter's transcript of the record on appeal in the state court of appeals. "CT" citations are to the clerk's transcript of relevant docket entries.

most part, these incidents occurred between January 29 and February 21. App., *infra*, 13a-14a.[3]

During the strike the growers were able to recruit some replacements and to harvest some of their crops. The growers were not able to perform all of the necessary cultivation practices at the proper times, however, and were not able fully to harvest all of the fields. App., *infra*, 14a.

2. *The State Court Decisions On Liability And Damages*

a. On January 28, 1980, Maggio and other growers filed this action in the superior court for Imperial County, seeking damages from the UFW and numerous individuals for alleged violence and unlawful picketing during the strike.[4] The parties initially intended to try

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[3] As discussed below, the trial court did not make any findings concerning specific acts or striker misconduct, other than to note that violence and misconduct occurred.

The state court of appeal, however, noted that during the course of a six-month strike there were five "major" confrontations between strikers and growers in January and February, with the last major incident occurring on February 21. App., *infra*, 14a n.4. The record reflects that on those occasions there were incidents of mass picketing, rock throwing, use of "nail-type" devices to cause flat tires to grower vehicles, and damages both to growers' and strikers' vehicles. App., *infra*, 14a n.4. Some pickets carried clubs and sticks.

The growers in turn were armed with guns. At one point during the stike, the Imperial County sheriff obtained a temporary restraining order to prevent grower personnel and security guards from carrying firearms, but there were weapons violations by growers even after the order was obtained. (RT: XII, pp. 2596-97, 2629; XIX, p. 4414). On February 10, a striker was shot and killed in a confrontation with grower personnel at a lettuce field owned by Sun Harvest, one of the struck employers. App., *infra*, 14a n.4.

[4] Following the filing of the Complaint in January 1980, the case languished. The Union was not served until December 20, 1980, and no significant activity occurred in the case for more than two years thereafter. In March 1983, the UFW filed a motion to dismiss the lawsuit under California Code of Civil Procedure § 583, which at that time provided that the court, "in its discretion, may dismiss

the case to a jury. Following several weeks of *voire dire*, however, the parties waived their right to a jury trial and stipulated to a bench trial before Judge William Lehnhardt. App., *infra*, 64a.[5]

Following an interlocutory appeal that is discussed at pp. 8-11 *infra*, the parties agreed to bifurcate the liability and damages portions of the trial. (RT: XL, pp. 10,131-32). On July 25, 1986, the trial court issued a decision on liability concluding that the Union was liable to Maggio for unspecified acts of violence and "unlawful picketing" from January 29, 1979 through June 30, 1979. App., *infra*, 1a-4a.

In reaching that conclusion, the trial court made no findings concerning any particular acts of misconduct, nor did that court make any findings as to how any particular act contributed to any of Maggio's losses. Instead, the trial court simply stated that "[d]efendant created a climate of violence which prevented plaintiff from recruiting sufficient workers to harvest its crops," and that "[d]efendant's violent conduct toward such harvesting activity as plaintiff was able to mount rendered that harvesting activity inefficient in certain cases and impossible in others." App., *infra*, 3a.

The trial court found that, although it "was not the sole cause of plaintiff's failure to cultivate and harvest

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an action for want of prosecution . . . if it is not brought to trial within two years after it is filed." On May 9, 1983, the growers filed a first amended complaint, and on May 27, 1983, the superior court denied the Union's motion to dismiss for failure to prosecute. App., *infra*, 50a-54a. Trial did not begin until March 5, 1985.

By the time of the trial court's decision on the merits in this case, all plaintiffs but Maggio had dismissed their claims, and the individual defendants were dropped from the case.

[5] The parties had great difficulty finding jurors who would be able to render an impartial verdict concerning the strike. As the state court of appeal noted, "Imperial County is a small, closely knit community economically dependent on agriculture. It may be virtually impossible to find county residents who were not personally affected to a greater or lesser extent by the strike." App., *infra*, 71a n.5.

its crops . . . , defendant's unlawful conduct was a substantial cause of plaintiff's loss." App., *infra*, 3a. That court concluded that, with the exception of two fields plaintiff was unable to harvest at the very start of the strike, "*all* of the crop loss claimed by the plaintiff was substantially caused by the defendant." App., *infra*, 4a. (emphasis added).

b. On April 16, 1987, the trial court entered judgment against the Union in the total amount of $1.68 million, App., *infra*, 5a-10a. In so doing, that court explained its approach to the award of damages as follows:

> As set forth fully in the court's [earlier] Statement of Decision Re Liability, the court found that plaintiff . . . met its burden in establishing that the tortious conduct of defendant proximately caused plaintiff's damage. Once plaintiff met its burden of proof that the unlawful strike activity was a substantial cause of plaintiff's damage, *the burden then shifted to defendant to show the extent of its contribution to plaintiff's damages, i.e., distinguish the damages caused* [*by*] *lawful conduct from the damages caused by unlawful conduct. Defendant did not meet this burden.* [App., *infra*, 5a-6a (emphasis added).]

Having thus shifted the burden to the Union to prove that Maggio's losses were *not* the result of tortious misconduct, the trial court again declined to make any findings concerning the manner in which specific acts of misconduct may have contributed to the employer's losses. That court simply concluded that Maggio lost $907,053 due to its inability to harvest its lettuce crop, $493,973 in unharvested broccoli; and $161,468 in carrots. The record reflects that included in these amounts are damages for Maggio's inability to harvest crops as late as May and June, at least three months after the last significant incident of picket line misconduct. (RT: XLi, pp. 10,134-40). In addition, the trial court awarded

$100,135 for Maggio's costs of providing security during the strike; $13,675 for the cost of housing replacement workers; and $3,149 for damages to vehicles and irrigation equipment. App., *infra*, 7a-9a.

c. The state court of appeal affirmed in all material respects. That court rejected the Union's claim that, by placing the burden of proof on the Union and failing to make specific findings that the employer's losses were in fact the direct result of tortious conduct, the trial court had violated the principles set forth in this Court's decisions in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966) and *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).[6]

The court of appeal, relying on common law tort principles, reasoned that "[w]here it is clear that a defendant has been at fault and that he has caused some part of the plaintiff's damages, the burden of proof should rest on him to show the extent of his contribution, and . . . if he cannot sustain it he should be liable for the entire loss." App., *infra*, 26a (citation omitted). That court stated that in its view this Court's decisions in *Gibbs* and other cases have "required the union to bear the burden of segregating damages once the plaintiff has shown the union's tortious conduct was a substantial cause of its losses." App., *infra*, 29a-30a n.16. And the court of appeal upheld the lower court's conclusion that the Union had failed to meet its burden here. App., *infra*, 24a-29a.[7]

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[6] In its briefs to the court of appeal, the union cited *Gibbs* and *Claiborne Hardware*, and argued that the trial court's damage award had impermissibly trenched on its constitutional rights to engage in free speech and lawful associational activities in connection with the Imperial Valley labor dispute. *See* Appellant's Opening Brief at 1-2, 39, 53-57, 64-66; Appellant's Reply Brief at 3-8. In addition, the Union cited this Court's decision in *Speiser v. Randall*, 357 U.S. 513 (1958) as specific authority for the proposition that shifting the burden of proof to the union violated constitutional principles under the First Amendment and Due Process Clause. *Id.* at 6-7.

[7] In addition, the court of appeal upheld the trial court's rulings on a range of other issues. The court of appeal, for example, ruled

d. The California Supreme Court denied the Union's petition to review the court of appeal's decision on May 16, 1991. Two justices, Mosk and Broussard, expressed the opinion that the petition should have been granted. App., *infra*, 55a.

3. *The Proceedings On The Motion To Disqualify The Trial Judge*

a. On May 24, 1985, after nearly two months of testimony, Judge Lehnhardt informed the UFW's trial counsel in an off-the-record discussion that his wife had worked for Maggio as a striker replacement in Maggio's carrot harvest during the 1979 strike. The Union moved to disqualify Judge Lehnhardt under California Code of Civil Procedure § 170.1. App., *infra*, 64a.[8] Judge Lehnhardt

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that the trial court had properly admitted testimony from labor contractors containing hearsay statements from potential replacement workers that they would not work for Maggio due to fear of strike violence. App., *infra*, 23a-24a. In addition, the court of appeal upheld the method by which the trial court calculated prices, estimated yields per acre, and the like in arriving at a figure for Maggio's crop losses. The court of appeal found that the lower court had properly applied the "collateral source rule" in declining to offset against the damage award some $565,000 that Maggio had received as compensation for lost crops from an employer group known as the Fair Negotiating Committee. Similarly, the court of appeal found that the Union was not entitled to offset against damages an amount Maggio received from the Mutual Harvest Effort as proceeds from Maggio lettuce fields harvested by that group. App., *infra*, 30a-50a.

[8] Section 170.1 provides in relevant part that "[a] judge shall be disqualified if . . . [f]or any reason . . . a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." App., *infra*, 62a.

In response to the Union's disqualification motion, Judge Lehnhardt filed a declaration in which he stated that he had forgotten about his wife's involvement as a replacement worker until testimony in the case touched specifically on the alleged effects of violence and threats on the carrot harvest and work by replacement workers in the carrot shed. App., *infra*, 65a. But the judge did not volunteer the information even then; rather, he disclosed his wife's

refused to disqualify himself, however, and the disqualification matter was referred to another superior court judge. On June 4, 1985, that judge denied the Union's motion. App., *infra*, 56a-61a.

b. The Union immediately filed a petition for a writ of mandate to disqualify Judge Lehnhardt in the state court of appeal. In an opinion issued on July 16, 1985, the court of appeal noted that in its view the petition presents "a very close issue," one that "touches upon the core of the judicial process—the appearance of objectivity of the decision maker." App., *infra*, 70a, 63a. The court of appeal nonetheless denied the petition for a writ of mandate. That court found that there was no "continuing relationship between Maggio and Mrs. Lehnhardt giving rise to any current personal or financial interest which would disqualify Judge Lehnhardt." And the court of appeal rejected the suggestion "that Mrs. Lehnhardt's willingness to work for two days during the strike would cause a reasonable person to infer that Judge Lehnhardt would either favor Maggio or be biased against the union." App., *infra*, 70a-71a.[9]

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involvement only in response to a direct question from one of the Union's attorneys. *See* July 25, 1985 Petition For Review filed in the California Supreme Court in *United Farm Workers of America, AFL-CIO v. Superior Court*, 4 Civil. No. D003238, pp. 8-9.

[9] The court of appeal cited and discussed several federal cases that themselves found proposition that, as a matter of federal constitutional law, disqualification would be required if " 'a reasonable member of the public at large, aware of all the facts, might fairly question the Court's impartiality.' " App., *infra*, 68a (*quoting United States v. Ferguson*, 550 F. Supp. 1256, 1260 (S.D.N.Y. 1982) (Weinfeld, J.)). *See also Potashnick v. Port City Construction Co.*, 609 F.2d 1101, 1111 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980).

In *Ferguson*, Judge Weinfeld reasoned that due process requires that "not only must there be the reality of a fair trial and impartiality . . ., but also the appearance of a fair trial and impartiality." 550 F. Supp. at 1260. In support of that proposition Judge Weinfeld cited this Court's decisions in *Marshall v. Jerico*, 446 U.S. 238, 242 (1980); *In re Murchison*, 349 U.S. 133 (1955); *Offut v.*

c. The Union filed a petition to review the denial of the writ of mandate in the California Supreme Court. Citing the federal cases that the court of appeal had discussed in its decision, the Union argued that the trial judge should be disqualified because

> the protection of the integrity and dignity of the judicial process from any hint or appearance of bias is the palladium of our judicial system. Any question of a judge's impartiality threatens the purity of the judicial process and its institutions. [July 25, 1985 Petition For Review at pp. 21-22 (*quoting Potashnick v. Port City Construction Co.*, 609 F.2d at 1111)].

And as noted above (n. 9 *supra*), the cases cited by the UFW cite in turn to pronouncements of this Court that the Due Process Clause itself requires "both the appearance and reality of fairness" and of an "impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerico*, 446 U.S. 238, 242 (1980).

The California Supreme Court denied the Union's petition for review on October 3, 1985. App., *infra*, 73a.

REASONS FOR GRANTING THE PETITION

INTRODUCTION

The Union in this case was engaged in a lawful strike under state law, and had the right under the First Amendment to engage in peaceful picketing to implore workers and others in the community to exercise their

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United States, 348 U.S. 11, 14 (1954); and *Taylor v. Hayes*, 418 U.S. 488 (1974). Those cases have sought to define the requirements for a fair tribunal under the Due Process Clause, and they hold that due process will require disqualification in situations "which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true" between an accuser and an accused." *In Re Murchison*, 349 U.S. at 136 (*quoting Tumey v. State of Ohio*, 273 U.S. 510, 532 (1927).

state law rights and honor the strike.[10] At the same time, although the parties vigorously disputed the evidence concerning the cause, extent and significance of strike violence as well as its relationship to the employers' claimed losses, there is no dispute that "some violence and public disorder" did occur. App., *infra*, 13a-14a.

The trial court did not, however, follow an approach calculated to limit its award of damages only to the direct consequences of violence. To the contrary, the trial court, with the approval of the state court of appeal, stated in a conclusory fashion that the incidents of violence were *a* "substantial cause" of the plaintiff-employer's losses, and then, without more, placed the burden on the *defendant-union* to separate those losses so caused from the consequences of lawful picketing and persuasion. Finding that the Union had not met that burden, the trial court imposed a ruinous judgment on the Union covering virtually all of the employer's claimed economic losses.

The sum and substance of the state court's approach to allocating losses here was to allow the plaintiff to collect damages for the consequences of *constitutionally protected activity* unless the *defendant* can prove by a preponderance of the evidence that some separable portion of the plaintiff's claimed losses was *not* due to tortious activity. These courts, in other words, proceeded as if it were proper to treat this case like a run of the mine tort case governed by normal tort causation and damages allocation rules.

By proceeding in that way, the state courts failed to heed the standards this Court has put in place to protect First Amendment rights where the course of conduct in question involves both constitutionally protected and unprotected activity. "[R]ecogniz[ing] the importance of avoiding the imposition of punishment for constitutionally

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[10] *See Senn v. Title Layers Union*, 301 U.S. 468, 478 (1937); *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Thomas v. Collins*, 323 U.S. 516, 532 (1945).

protected activity," (*NAACP v. Claiborne Hardware*, 458 U.S. 886, 932 (1982)), the Court has made it plain that ordinary tort adjudication principles do *not* apply in a case such as this one. Rather, the plaintiff must at a minimum meet the heightened burden—which is a heavy one—of "demonstrating that fear rather than protected conduct was the *dominant force*" in the defendant's course of conduct as a whole (*id.*, emphasis supplied).

The state courts, moreover, compounded their error by shifting the burden of avoiding damages to the Union merely upon a conclusory finding that tortious conduct was *one* "substantial cause" of the employer's injury. In this regard, the decision below conflicts with the decisions of at least two other state courts concerning the adjudication of damages actions where the economic losses were caused in part by lawful, protected activity as well as with similar decisions of two federal courts of appeals.

The overall result of this entirely unsound approach is to make it an easy matter for plaintiffs to collect damages for losses cause by constitutionally protected activity. The particular result in this case is to grant an agricultural employer enormous damages that all but decimate the treasury of the union seeking to represent the agricultural laborers who have historically been among the most exploited workers in this society. Both of these results urgently call for this Court's review of the judgment and decision below.

B. Particularly given the paucity of detailed factual findings in this case to support the trial court's imposition of a burden of proof on the Union, the separate due process question presented by the trial judge's failure to disqualify himself provides an additional compelling reason for granting the petition. Not only actual bias but also the appearance of bias or an undue risk of bias in the finder of fact is constitutionally unacceptable. As discussed below, we submit that allowing a judge whose spouse has worked as a strike replacement during a

labor dispute to adjudicate her employer's claim for damages against a union charged with threats and violence against the replacements in that very dispute cannot be squared with the requirements of due process. It is beyond human nature to ask a judge to render scrupulously unbiased justice in these circumstances or to ask the defendant to accept the judge's ruling as unbiased justice.

I. THE DECISION BELOW CONFLICTS WITH THE GOVERNING DECISIONS OF THIS COURT AND WITH DECISIONS OF OTHER STATE AND FEDERAL COURTS

A. In this case, the Union was attempting, through its strike and attendant picketing against the employer, to secure a collective bargaining agreement. This goal was entirely proper as a matter of California law. Thus, as in *Claiborne Hardware, supra,*

> The charge of illegality—like the claim of constitutional protection—derives from the *means* employed by the participants to achieve those goals. The use of speeches, marches and threats of social ostracism cannot provide the basis for a damages award. But violent conduct is beyond the pale of constitutional protection. [458 U.S. at 933, emphasis supplied.]

Under these circumstances, in order to protect "the important First Amendment interests at issue" (*id.* at 918), rote application of ordinary state tort adjudication principles is not necessarily sufficient. Rather, because the state "may not award compensation for the consequences of nonviolent, protected activity" (*id.*), the need to accomodate state law with federal constitutional principles arises whenever a state seeks to impose liability for tortious conduct that occurs in the context of constitutionally protected activity, and to make that accommodation, "precision of regulation" is essential. *Id.* at 916, quoting *NAACP v. Button*, 371 U.S. 415, 438 (1968).

Thus, although courts have the unquestioned power to provide a remedy for violence and threats of violence, " 'the permissible scope of state remedies in this area is

strictly confined to the direct consequences of such conduct and does not include consequences resulting from associated peaceful picketing' " or other expressive conduct protected by the First Amendment. *Claiborne Hardware*, 458 U.S. at 918 (*quoting United Mine Workers v. Gibbs*, 383 U.S. 715, 729 (1966)) (emphasis added).[11]

In *Claiborne Hardware*, the Court concluded that "the careful limitation on damages liability imposed in *Gibbs*" as a matter of federal labor law is equally applicable to First Amendment conduct as a matter of constitutional law. The Court reversed a state court judgment against the NAACP for the entire amount of losses during a seven-year consumer boycott in Mississippi, because an independent review of the record showed that incidents of violence and illegal conduct on which the state court had based its decision had in fact been only one cause of the plaintiffs' extensive economic losses due to the boycott,

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[11] In *United Mine Workers v. Gibbs*, 383 U.S. 715, a case decided under federal labor law, the Court considered a state law claim for damages against a union that had engaged in lawful primary picketing over a protracted period, during which time violence occurred at the beginning of the picketing but not thereafter. The Court reversed a lower court judgment awarding damages on the ground that the lower court had *not* "adequately defined the compass within which damages could be awarded under state law," and had awarded damages for the consequences of protected picketing activity. 383 U.S. at 732. In so doing, the Court concluded that state power may not be "exerted to compensate for anything more than the direct consequences of . . . violent conduct." *Id.* at 730 (*quoting San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 249 n.6 (1958)).

The Court in *Gibbs* found support for its position in the Court's earlier decisions in *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656 (1954) and *International Union, United Auto Workers v. Russell*, 356 U.S. 634 (1958). As the Court in *Gibbs* noted, 383 U.S. at 730, the damages awarded on a state law claim for violence in *Laburnum* were restricted to the "damages directly and proximately caused by wrongful conduct chargeable to the defendants." Similarly, in *Russell*, the Court "specifically observed that the jury had been charged that to award damages it must find a proximate relation between the violence and threats of force and violence complained of, on the one hand, and the loss of wages allegedly suffered, on the other." *Gibbs*, 383 U.S. at 730.

and that the consequences therefrom were separable from the consequences of the lawful boycott activity.[12] The Court held that where both constitutionally protected and unlawful means are used toward an otherwise lawful goal, the plaintiff can recover for economic losses only insofar as it can bear "the burden of demonstrating that fear rather than protected conduct was the *dominant force*" in causing the loss. 458 U.S. at 933 (emphasis added). As the Court further explained:

> In litigation of this kind the stakes are high. Concerted action is a powerful weapon . . . The burden of demonstrating that [violence] colored the entire collective effort . . . is not satisfied by evidence that violence occurred or even that violence contributed to the success of the boycott . . . Such a characterization must be supported by findings that adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means, that carefully identify the impact of such unlawful conduct, and that recognize the importance of avoiding the imposition of punishment for constitutionally protected activity. . . . A court must be wary of a claim that the true color of a forest is better revealed by reptiles hidden in the weeds than by the foliage of countless freestanding trees. [458 U.S. at 933-34].

Gibbs and *Claiborne Hardware* entail the conclusion that, where a plaintiff seeks damages for torts committed during the exercise of lawful expressive conduct, the plaintiff cannot meet its burden to demonstrate that the damages it seeks are in fact the direct consequences of the tort simply by meeting ordinary tort causation standards and then having the evidentiary burden shifted to plaintiffs. Rather, those cases require that plaintiffs meet a heightened burden and, to assure that the burden has

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[12] As the Court in *Claiborne Hardware* noted, the state law rules applied to adjudictae civil lawsuits between private parties constitute "state action" for purposes of the First and Fourteenth amednments. 458 U.S. at 961 n.51 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964).

been met, require that the state courts in cases of this kind support their decisions with evidentiary findings sufficient to identify the precise impact of unlawful violence and to make clear that state power is not being applied to compensate "for the consequences of nonviolent, protected activity." *Claiborne Hardware*, 458 U.S. at 918.

Nonetheless the state courts proceeded to adjudicate this case as if *Claiborne Hardware* and *Gibbs* had never been decided and as if this were a run of the mine tort case in which damages could be assessed on normal tort damages rules. That, we submit, was an error that this Court must correct.

In proceeding in this way the court of appeals purported to rely on the *Gibbs* Court's discussion of *Milk Wagon Drivers v. Meadowmoor Dairies, Inc.*, 312 U.S. 287 (1941), in which this Court found that "special facts" of pervasive violence might support the conclusion that damages due to lawful conduct are not "separable" and that *all* damages resulting from a strike or picketing must be awarded. *Gibbs*, 383 U.S. at 731-32.[13] But the lower court's reliance on that so-called *Meadowmoor* exception was entirely misplaced.

First, in *Meadowmoor itself*, the Court cautioned that the extraordinary remedy imposed there could never be justified

> by insubstantial findings of fact screening reality. That is why this Court has the ultimate power to search the records in the state courts where a claim of constitutionality is effectively made. And so the right of free speech cannot be denied by drawing from a trivial rough incident or a moment of animal exuberance the conclusion that otherwise peaceful picketing has the taint of force. [312 U.S. at 293.]

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[13] In *Meadowmoor*, the Court held that specific and substantial findings of pervasive violence justified an injunction against both violent and nonviolent activity.

Second, this Court has distinguished the facts of *Meadowmoor* in every similar case that has been decided since, including in *Gibbs* and *Claiborne Hardware*.[14] And the Court has required, as a matter of constitutional principle, the most painstaking factual showing, accompanied by specific judicial findings, before a conclusion of "inseparability" under *Meadowmoor* can be made. *See Claiborne Hardware*, 458 U.S. at 932-33.

The decision of the lower court does not even begin to approach the evidentiary requirements imposed in this Court's decisions. The lower court's factual findings are worse than insubstantial; they are nonexistent.[15]

B. The courts below, then, failed to make even conclusory findings sufficient to show that plaintiff met its heightened burden of proof, much less the detailed evidentiary findings necessary for reviewing courts to determine on their own whether that burden has been sustained. In this regard the state decision here conflicts with the decisions of other state and federal courts.

For example, in *United Aircraft Corp. v. Intl. Assn. of Machinists*, 161 Conn. 79, 285 A.2d 330 (1971), *cert. denied*, 404 U.S. 1016 (1972), *on appeal following remand*, 169 Conn. 473, 363 A.2d 1068 (1975), *cert. denied*, 425 U.S. 973 (1976), the Connecticut Supreme Court

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[14] *See AFL v. Swing*, 312 U.S. 321, 325 (1941); *Cafeteria Employees Local 302 v. Angelos*, 320 U.S. 293, 296 (1943); *Youngdahl v. Rainfair, Inc.*, 355 U.S. 341 (1958); *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 180-81 (1968).

[15] As the Court has made clear on a number of occasions, where, as here, the issue is whether the state has intruded into areas of expression guaranteed by the First Amendment, the Court will make an independent examination of the record to assure that " 'the judgment does not constitute a forbidden intrusion on the field of free expression.' " *Claiborne Hardware*, 458 U.S. at 915 n.50 (citations omitted); *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963); *Meadowmoor*, 312 U.S. at 293. Thus, the serious constitutional issues raised in this case may not be minimized by characterizing them merely as the application of settled principles to particular facts.

took a markedly different view from the court below of the evidentiary burdens required to support a state law damage award in a case involving both illegal and affirmatively protected activity. In particular, the Connecticut court expressly rejected the position of the state court here that once ordinary causation standards were met, "the burden was on defendants to establish the allocation of losses between peaceful strike activity and unlawful strike activity." 285 A.2d at 342. The Connecticut court held instead that "[i]t was the plaintiff's burden to prove the damages which it claimed had resulted from the tortious acts complained of." *Id.*[16]

Similarly, *Stryjewski v. Local 830, Brewery Drivers*, 451 Pa. 550, 304 A.2d 463 (1973), makes plain that the Pennsylvania courts would reject the trial court's findings and its allocations of burdens here as a basis for awarding damages. In reversing a lower court damage award, the *Stryjewkski* court rejected as insufficient to sustain the verdict the conclusory statement in "the Chancellor's adjudication stat[ing] that '[a]ll damage suffered by Plaintiffs from the union's activity was substantially caused by the union's violent and mass activities and picketing . . .,'" 304 A.2d at 466. The *Stryjewski* court explained:

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[16] The court in *United Aircraft* rejected the employer's claim that damages from lawful and unlawful conduct were not separable and therefore should have been awarded against the Union in their entirety. That court ordered the trial court to calculate, as a percentage of the employer's total strike losses, the monetary value of the losses "due to the involuntary absence of employees because of fear and coercion as a result of . . . illegal, tortious activities." 363 A.2d at 1071.

In response, the lower court took live testimony from 135 employees and reviewed written testimony from 73 others concerning their reasons for being absent from work during the strike. On the basis of the evidence the court concluded that tortious acts caused 23.6 percent of the employer's losses at one plant and 19.3 percent of the losses at another plant. These findings were set forth in a decision containing "401 number paragraphs covering 109 printed pages of record." 363 A.2d at 1071.

> Our task is *not* merely to ensure that the damages sustained were proximately caused by the challenged picketing and other activity, but rather is to ensure that such damages, to be constitutionally compensable, resulted *solely* from unlawful and violent activities, which are without the protection of the first amendment. [*Id.*, emphasis supplied.]

Because "no computations exist within the adjudication which indicate how the damages were apportioned between the constitutionally protected and unlawful picketing activities; nor does the opinion indicate the specific injuries to the plaintiff which support the . . . damage assessment" (*id.*), the Pennsylvania Supreme Court could not simply review the findings below applying the proper constitutional standard, but instead remanded for constitutionally appropriate findings and conclusions.

The decision below is also at odds with the law as announced and applied in the Ninth and Eleventh circuits. In *Rainbow Tours v. Hawaii Joint Council*, 704 F.2d 1443 (9th Cir. 1983), the Ninth Circuit considered a case in which there was evidence of unlawful mass picketing on two days, January 29 and 30, and lawful picketing thereafter. The trial court had awarded damages for an employer's loss of business through February 7. The Ninth Circuit reversed, and held that in no event could damages be awarded for days after January 30. Moreover, the Ninth Circuit left it to the trial judge on remand to determine the reasons why employees did not go to work on January 29 and 30. The court of appeals made clear that, if the trial court determined that employees stayed away out of "union principle," and not in response to the unlawful picketing, no damages could be awarded even for the days on which unlawful picketing occurred. 704 F.2d at 1447-48.

Finally, in *Pantex Towing Corp. v. Glidewell*, 763 F.2d 1241 (11th Cir. 1985), the court, following the approach of the Ninth Circuit in *Rainbow Tours*, held that damages for lost business could not be awarded even for days

on which unlawful picketing occurred unless the employer could demonstrate that employees stayed away out of fear, and not for reasons of union solidarity. 763 F.2d at 1250. It is clear from these decisions that these courts, contrary to the court below, would not permit an award of damages except to the extent that the *plaintiffs* met the burden of demonstrating which damages were *in fact* the direct result of unlawful conduct, and not the consequence of lawful, protected union activity.

C. The decision below, in addition to being inconsistent with this Court's central holdings in *Gibbs* and *Claiborne Hardware* and in conflict with the decisions of the lower courts in directly analogous circumstances, is at odds with the principles more generally applicable in adjudicating cases involving First Amendment protected activity.

For example, *Speiser v. Randall*, 357 U.S. 513, 525 (1958) (emphasis supplied), teaches that where the issue "is one of alleged trespass across "the line between speech unconditionally guaranteed and speech which may legitimately be regulated' . . . *where the burden of proof lies may be decisive of the outcome.*" *See also Armstrong v. Manzo*, 380 U.S. 545, 551 (1965). *Speiser* itself involved a state rule denying tax exemptions to persons advocating the violent overthrow of the government, and the Court assumed without deciding that states could deny exemptions to persons who engaged in speech for which they constitutionally could be fined or imprisoned. The Court held, however, that the state could not place on the taxpayer the burden of proving that he had *not* engaged in the prohibited activity, for to do so would unduly chill the exercise of important First Amendment freedoms. 357 U.S. at 526.

Similarly, in other areas of constitutional law this Court has formulated analogous tests of causation that seek to distinguish between results caused by the exercise of constitutional rights and results caused by other, unprotected conduct. In *Mount Healthy City School District v. Doyle*, 429 U.S. 274 (1977), for example, the Court re-

quired that a public employer bear the burden of showing that a decision to discharge an employee would have occurred even in the absence of the employee's First Amendment conduct.

The employer in this case should bear no less a burden of demonstrating, in effect, that the damages it claims are solely the result of unprotected conduct, and bear no causal relationship to protected picketing.

II. THE TRIAL JUDGE'S FAILURE TO DISQUALIFY HIMSELF RAISES AN ADDITIONAL ISSUE WARRANTING THIS COURT'S REVIEW

The Court's cases under the Due Process Clause have recognized that a "fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). This due process requirement seeks to protect "both the appearance and reality of fairness." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

To be sure, not every issue relating to judicial disqualification rises to a constitutional question under the due process clause. *Aetna Life Ins. Co. v. LaVoie*, 475 U.S. 813, 820 (1986). Nonetheless, "various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). In such cases, disqualification is constitutionally required.

Up to this point, these cases have included those in which the adjudicator is disqualified due to a direct pecuniary interest in the outcome of the proceeding,[17] or in which a judge who has been the target of personal abuse or criticism is disqualified from presiding over contempt proceedings.[18] The Court has not yet had occasion to con-

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[17] *See Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Tumey v. Ohio*, 273 U.S. 510 (1927).

[18] *Taylor v. Hayes*, 418 U.S. 488, 501-03 (1974); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971).

sider a due process claim for disqualification in the specific situation presented here, in which the judge's spouse was directly included in the underlying events of the case and, indeed, was a potential witness. In such a situation, no less than in this Court's prior cases, there is at least a "temptation to the average man as a judge . . . not to hold the balance nice, clear and true" between the parties. *In re Murchison*, 349 U.S. at 136.

We submit that this issue in this context is an important one that warrants the Court's review. As we have shown, the adjudication of the claims involved in cases such as this requires particularly difficult and sensitive judgments by the trier of fact. A judge in such a case is asked to make difficult legal judgments, as well as to weigh the credibility of strikers and strike replacements alike concerning the nature and effect of alleged strike misconduct. A judge who is married to and lives with a replacement will have experienced the strike in a much more personal light than otherwise, and it is difficult to imagine that the judge will not be inclined to tilt his sentiments toward the employer and replacements and away from the union and the strikers.

Both sides in these cases, as well as the public itself, deserve scrupulous fairness in the adjudication of the emotional issues arising out of labor disputes. The risk of bias in allowing a judge to adjudicate issues in a labor dispute in which his spouse worked as a strike replacement is a risk, we submit, that the due process clause forbids.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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